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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

-----x

3 ADINA KADDEN,

4 Plaintiff,

5 v.

11 CV 4892 (SAS)

6 VISUALEX LLC,

7 Defendant.

8 -----x

9 New York, N.Y.
March 12, 2012
3:17 p.m.

10 Before:

11 HON. SHIRA A. SCHEINDLIN,

12 District Judge

13 APPEARANCES

14 MARK RISK PC

15 Attorney for Plaintiff

16 MARK RISK

17 EPSTEIN BECKER & GREEN PC

Attorneys for Defendant

18 TRAYCEE ELLEN KLEIN

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1 (In open court)

2 THE COURT: Mr. Risk, is that you? And Ms. Klein?

3 MS. KLEIN: Yes.

4 THE COURT: Is it Klein, K-L-E-I-N?

5 MS. KLEIN: Yes.

6 THE COURT: OK.

7 I wasn't even sure you still needed to see me because
8 I had two letters on this case, one dated February 16th and one
9 dated February 22nd. Unfortunately, I read them then, which
10 means I can't remember a word now. But I did make a note.
11 Here's the note I made to myself: "The plaintiff's 2/16 letter
12 complains of three things. The defendant's 2/23 letter
13 resolves two of the three. Call the plaintiffs lawyer. Does
14 he still seek court intervention?" Two of the problems seem to
15 be resolved in the letters.

16 MR. RISK: Yes --

17 THE COURT: Good.

18 MR. RISK: -- and we subsequently scheduled this
19 conference.

20 Should I remind your Honor of the third thing?

21 THE COURT: Yes, I have one thing to decide, right?

22 MR. RISK: Yes.

23 THE COURT: All right, so I'll look it up in the first
24 letter, the moving letter. Which are the numbers 1, 2, 3 or 4?
25 1, 2 or 3?

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1 MR. RISK: It's the issue about the
2 attorney-client/work product privilege.

3 MS. KLEIN: It's number 2.

4 THE COURT: Number 2? So he wrote -- I'm just going
5 to read it aloud for the record, thereby reminding myself --
6 "VisuaLex has pleaded as an affirmative defense that it
7 exercised good faith in determining in March 2009 that Kadden
8 was not entitled to overtime compensation (at which time it
9 stopped paying it). Such a defense, if proven by VisuaLex,
10 limits Kadden's liquidated damages remedies. VisuaLex has
11 identified its privileges as a series of emails exchanged with
12 outside counsel in March of 2009. VisuaLex appears to be
13 relying on the communications as the basis for its good-faith
14 claim while declining to produce them. We argue that VisuaLex
15 should either produce the document or draft advice of counsel
16 as basis for its good-faith defense. The emails might reveal
17 that counsel advised VisuaLex that Kadden was nonexempt."

18 And in the response --

19 MS. KLEIN: Right.

20 THE COURT: Oh, that's long, so I'll have to summarize
21 it.

22 You say there are two reasons they're not entitled to
23 these privileged documents: First, it's too early at this
24 moment. If the Court finds that plaintiff was exempt, then the
25 issue of good faith never becomes an issue.

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1 So the defendant thinks this should be postponed until
2 after summary judgment on the issue of exempt or nonexempt.

3 But secondly, counsel, plaintiff's counsel, has
4 supposedly given a lot of leeway when deposing a president and
5 one of the owners of VisuaLex. Plaintiff's counsel questioned
6 this lady about what the reasons were for the change of
7 compensation for Ms. Kadden and what steps VisuaLex took to
8 determine if the position of litigation practice consultants
9 was exempt or nonexempt. Ms. Romano testified that she went
10 online she read information, and she consulted with the
11 Department of Labor website and she consulted counsel.

12 When asked about her interaction with counsel, the
13 parties agreed that she could answer whether she followed the
14 advice of counsel yes or no.

15 Did she answer yes or no to that? What did she say?

16 MS. KLEIN: She said yes.

17 THE COURT: Yes, she followed the advice of counsel?

18 OK.

19 Then defense counsel takes the position that if I
20 think that this should be decided at this stage of the
21 litigation, the documents should be submitted for in camera
22 review to determine whether there's any bad faith there. And
23 that would strike the balance.

24 So that's the remaining issue? That's it?

25 MR. RISK: Yes, your Honor.

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1 THE COURT: That's all you're doing here today?

2 MR. RISK: Well, I may raise some other matters with
3 the Court but that's principally why we're here today.

4 THE COURT: Well, as far as that matter goes, why
5 isn't your adversary right about first we figure out if she's
6 exempt because we don't ever reach good faith if she's exempt?

7 MR. RISK: Well, up until this moment there's been no
8 bifurcation of discovery. I have a discovery cutoff, and I had
9 to either do it or raise it with your Honor. I might also add
10 that it's possible in summary judgment practice I would move
11 for summary judgment with respect to the third affirmative
12 defense, which is the good-faith defense.

13 THE COURT: Well, I understand your point. It puts us
14 through two stages of motion practice. If I find she's not
15 exempt, then I'd have to reach this good-faith issue and we'd
16 have to have discovery of privileged communication.

17 MR. RISK: Yes, and depending upon -- there's a
18 privilege log produced with a list of emails back and forth --

19 THE COURT: Sure.

20 MR. RISK: -- in the two-week period prior to the
21 change in policy.

22 THE COURT: Of course. And she was asked if she
23 followed the advice of counsel. She said yes. So if I were to
24 review them in camera, it's likely they won't show bad faith,
25 it's likely that -- that's my guess.

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1 MR. RISK: They'll say what they say.

2 THE COURT: True, but counsel represented her, she's
3 seen them, that Romano followed the advice of counsel.

4 MR. RISK: Well, Romano said she followed it. That's
5 the basis of the defense from which they're going to seek to
6 pay no liquidated damages. I need to see them and possibly
7 take a brief deposition of Ms. Romano about them. Your Honor
8 certainly may order that.

9 THE COURT: Well, if I looked at them in camera and
10 the advice says she's exempt, you don't have to pay, there's
11 nothing much more to do.

12 MR. RISK: If they say that unambiguously, I suppose
13 that's right.

14 THE COURT: Yes. How many documents would I have to
15 look at to determine?

16 MS. KLEIN: Not very many, and I actually brought them
17 in case your Honor wanted to get to that point.

18 THE COURT: That may be the fastest way, look at them.

19 MS. KLEIN: I can assure you, as a member of the bar
20 and having signed this document, that there is nothing
21 contrary. Would you like me to approach with them, your Honor?

22 THE COURT: Yes. But I think your adversary should
23 accept your representation. If you read them all, it seems
24 silly for me to do it too.

25 MR. RISK: Well, your Honor, I'm a lawyer taking

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1 discovery; I feel I need to see them.

2 THE COURT: I know, but we're not going to give them
3 to you. If they say what your adversary says they say, you
4 really are questioning her.

5 MR. RISK: If they unambiguously say we believe
6 Ms. Klein is exempt and your Honor presents that --

7 THE COURT: I know, but your adversary represented
8 that. I don't know why I have to do --

9 MR. RISK: Well, respectfully, I'd like your Honor to
10 review them.

11 MS. KLEIN: Your Honor, can I add one thing: Of
12 course I'll give them to the Court, but the bigger issue, which
13 goes to the liquated damages, is whether or not there is
14 anything in here that would show that they disregarded --

15 THE COURT: Right, of course.

16 MS. KLEIN: -- my advice.

17 THE COURT: It's you?

18 MS. KLEIN: Yes, it's me.

19 THE COURT: Oh, you're the counsel that gave the
20 advice?

21 MS. KLEIN: Yes.

22 May I approach?

23 THE COURT: Then I guess you agree with them.

24 MS. KLEIN: I have to.

25 THE COURT: You really know what they say.

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1 MS. KLEIN: I do, I do.

2 Because they were emails to and from me, I apologize
3 how they printed out but that's just how it worked.

4 THE COURT: Right.

5 (Pause)

6 THE COURT: OK, it's just as your adversary
7 represented.

8 MS. KLEIN: May I approach, your Honor?

9 THE COURT: Yes. The advice is essentially they're
10 exempt.

11 MR. RISK: Well, your Honor --

12 THE COURT: There's nothing for you to see.

13 MR. RISK: That's true if VisuaLex accurately
14 described --

15 THE COURT: No, I read it.

16 MR. RISK: Well, if the company accurately described
17 the plaintiff's duties to Ms. Klein. She can only --

18 THE COURT: They used the offer letters.

19 MR. RISK: Well, candidly, your Honor, the case for
20 liability --

21 THE COURT: Have you seen the offer letters?

22 MR. RISK: Yes.

23 THE COURT: OK, so it's based on the offer letters.

24 MR. RISK: Well, candidly, your Honor, the case for
25 nonexemption is so solid here, it's hard to imagine that such a

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1 counsel opinion, but your Honor's read them and I think you've
2 ruled.

3 THE COURT: Yes.

4 MR. RISK: While we are here -- we're up to the
5 discovery cutoff and we're due here next week I guess for a --

6 THE COURT: Premotion conference?

7 MR. RISK: -- premotion conference. And we can return
8 for that. I have outstanding a short list of document requests
9 to the defendant from February 23rd. I'd like your Honor to
10 direct that we resolve them by next week. Defendant's stated
11 position is it won't discuss them with me because I sent them
12 by letter rather than by an additional Rule 34 demand.

13 THE COURT: I don't stand by formalities very much.
14 So I'm not worried about it not having the words "Rule 34" in
15 the upper right-hand corner. Are you prepared to give the
16 documents or no, substantively?

17 MS. KLEIN: Your Honor, my response to Mr. Risk was
18 more than that, that it was just not in the form of a Rule 34;
19 it was also premature in that we didn't have the amount of time
20 we were entitled to, either formal or informal, under Rule 34
21 to respond. I don't I believe some of the documents will be
22 produced, but, again, I'm still evaluating that within the time
23 frame we're allowed.

24 THE COURT: You mean under the rules?

25 MS. KLEIN: Yes.

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1 THE COURT: But the rules say -- nobody wants to read
2 that phrase, whether it can shortened or lengthened by the
3 Court. It's not 30 days -- that's sort of presumptive. But if
4 he says I need it by the discovery cutoff so I can get it by
5 the premotion conference, it's not that hard to look through
6 and see whether you object or plan to produce them.

7 MS. KLEIN: Your Honor, I can have them to him before
8 next week's conference.

9 THE COURT: All right. So apparently --

10 MR. RISK: If there's something we can't resolve,
11 we'll raise it with you next week if that's OK.

12 THE COURT: That's slow. I'd like to get it done.
13 Why don't you raise it tomorrow by phone so we're ready for
14 next week's conference, take a look at it.

15 MS. KLEIN: I can have a response by the close of
16 business tomorrow, to Mr. Risk.

17 THE COURT: That won't do me any good because I'm
18 leaving at the close of business tomorrow for a big three-day
19 holiday.

20 MS. KLEIN: I will try to get it to him well before
21 that.

22 THE COURT: I mean that's it for a year, so that's
23 kind of pathetic. So I'd like my three days without worrying
24 about this case.

25 MS. KLEIN: Your Honor -- Mr. Risk, are you done with

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1 your discovery issues?

2 THE COURT: Can't we just look at them now and see
3 whether any of them are objectionable?

4 MS. KLEIN: Sure.

5 Number 1 of his request, I've provided that to him.

6 MR. RISK: Well, that's not quite right.

7 MS. KLEIN: OK, so why don't you address them.

8 MR. RISK: If you'd like, your Honor, we've sought the
9 documents -- well, Ms. Kadden, VisuaLex is a small litigation
10 consulting firm with a small group of employees that renders
11 services for lawyers. We were talking about the position of
12 litigation graphics consultant. Ms. Kadden happens to have a
13 law degree although she's not a member of the bar. Among the
14 many exemptions the defendant is claiming is the learned
15 professional exemption. I think that discovery is showing that
16 the other people in her category were not lawyers and that the
17 specialized legal training was not required for the position.
18 There's about a half dozen other people over a short period;
19 I'm seeking their resumes, offer letters and job descriptions.

20 A moment ago I think the resumes were handed to me,
21 and I am waiting for the job descriptions and offer letters.

22 THE COURT: Could you produce the offer letters and
23 job descriptions?

24 MS. KLEIN: Your Honor, what I would represent is the
25 following: The resumes have been given. The offer letters are

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1 not going to add anything to that --

2 THE COURT: But there's no reason they shouldn't be
3 produced.

4 MS. KLEIN: No.

5 THE COURT: All right.

6 MS. KLEIN: I don't have a problem with the offer
7 letters.

8 THE COURT: OK.

9 MR. RISK: I think they will be probative of whether
10 Kadden's --

11 THE COURT: I think she just said she has no problem,
12 so I wouldn't say anything else if I were you.

13 MR. RISK: Sorry.

14 THE COURT: Next?

15 MS. KLEIN: Number 2, I can't give an answer to the
16 Court because I don't know whether or not such a thing exists;
17 I have to check with the client.

18 THE COURT: That's number 2?

19 MS. KLEIN: Number 2.

20 THE COURT: What is number 2?

21 MR. RISK: If I may, your Honor, it's a dropdown menu
22 from a software program. I'm assuming that's not a hard item
23 for VisuaLex to produce.

24 THE COURT: Is that what it is, Ms. Klein, a dropdown
25 menu?

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1 MS. KLEIN: He's describing it in his letter. He's
2 asking for a copy of the list of, quote, service item options
3 from the dropdown menu in VisuaLex's QuickBooks software time
4 records program as it existed during Kadden's employment under
5 the column "Service Item" listing the categories of services,
6 i.e., consulting, project management, et cetera.

7 And what I'm represent is, I don't know if that exists
8 still. I understand that's what counsel is describing it. If
9 it does exist, I will be able to produce it. I don't know
10 if --

11 THE COURT: It should exist and it would describe what
12 the person actually did all day. If you can get it, you have
13 to produce it.

14 OK, so she will produce that if she can locate it.
15 Next.

16 MS. KLEIN: Your Honor, it's not if I can locate it;
17 it's whether or not they still use that software.

18 THE COURT: It comes to the same thing.

19 MS. KLEIN: If it exists.

20 THE COURT: If it exists you're going to produce it.
21 That's the same as if you locate it. If it doesn't exist, I
22 guess you won't located it.

23 Next. What's next?

24 MR. RISK: A corrected copy of one page from the
25 software program; something's cut off.

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1 MS. KLEIN: Which you have been provided already?

2 THE COURT: A corrected copy he has?

3 MR. RISK: Well, it's still cut off.

4 MS. KLEIN: It's the only one I have.

5 THE COURT: Is that right?

6 MS. KLEIN: It's exactly -- I sent him another one
7 last week. It's exactly what I have.

8 THE COURT: You can't produce it without it being cut
9 off when printed?

10 MR. RISK: I think you have to go back to the
11 software. If you can produce it, produce it; if not, you
12 can't.

13 THE COURT: Sort of the like the other one, where
14 you're going to go back to the software, if you can produce it
15 in a better format, please do.

16 MS. KLEIN: Sure.

17 THE COURT: Next.

18 MR. RISK: Number 4 is documents that indicate any
19 comp time given to Ms. Kadden per VisuaLex's testimony.

20 MS. KLEIN: I think it's important for you to read the
21 next sentence for the Court.

22 MR. RISK: I will. I believe that Romano testified
23 she is not aware of the existence of any such document.

24 THE COURT: OK, if there's no document showing comp
25 time, then you can't create what doesn't exist. If there are

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1 any documents showing comp time, produce them.

2 MR. RISK: Number 5 requires some explanation. When
3 Ms. Klein took Ms. Kadden's deposition, there was some
4 testimony about several matters Kadden worked on that she had
5 larger responsibilities for, which VisualLex is going to claim
6 is relevant to her exempt status. We will claim that Kadden
7 had more responsibility when her boss, Ms. Romano, was out,
8 related to medical leave and illness of a parent, and that
9 those are not typical of her duties. There was a short period.

10 So I've asked for, from the same time record program,
11 I've asked for the records indicating Ms. Romano's attendance
12 and activities during the period September through
13 December 2010 during which time Ms. Kadden was working on these
14 three cases.

15 THE COURT: And your position, Ms. Klein?

16 MS. KLEIN: Your Honor, I would object to this for
17 several reasons. One, I don't believe that there is any
18 relevance to Ms. Romano's activities. There is --

19 THE COURT: Didn't he say Kadden filled in for her for
20 a period of time and performed her duties?

21 MR. RISK: That's what we argue.

22 MS. KLEIN: It sounds like that is what they're
23 arguing, but they hold the same position, the two women; they
24 are both litigation consultants for the company.

25 THE COURT: But then we'd like to see what that other

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1 woman listed as her duties, her service item.

2 MR. RISK: Where she was -- I think she was out a lot
3 during that quarter.

4 THE COURT: Out --

5 MS. KLEIN: If you're asking for records that show the
6 president and owner of the company is out on a sick day, I
7 don't believe it exists.

8 THE COURT: I don't think that shows anything.
9 Anyway, it's what she fills in when she is there, what she
10 fills in on her time records.

11 MR. RISK: But, your Honor, Ms. Klein, in her
12 deposition of Ms. Kadden, examined her extensively with respect
13 to her work on three cases.

14 THE COURT: Right.

15 MR. RISK: We're trying to say that in the scope of
16 Kadden's work at VisuaLex the three cases took place in a short
17 period when Ms. Romano was out.

18 THE COURT: So you just want her to compile the number
19 of days --

20 MR. RISK: I think it's in the software program.

21 THE COURT: -- Ms. Romano was out during the
22 three-month period?

23 MR. RISK: No, I think the software program will say
24 where and what she was doing.

25 THE COURT: What does it matter if she was visiting a

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1 sick relative or in the hospital having elective surgery?

2 MS. KLEIN: Which both happened.

3 THE COURT: She was out; it doesn't matter.

4 MR. RISK: Whatever the records say --

5 THE COURT: No, that's an invasion of her privacy. If
6 she was out, you might want to know that, was she out eight or
7 twenty days in the three-month period. But where she was,
8 whether she was in the hospital having surgery, whether she was
9 visiting a sick mother, whether she was taking care of a sick
10 child is irrelevant to you; she was out.

11 MR. RISK: That's right.

12 THE COURT: So count up the number of days her records
13 show she was out during that period and simply write your
14 adversary a letter, saying I reviewed the time records and
15 Ms. Romano was out eight days or ten days or twenty-five days
16 during that quarter, whatever it is.

17 MS. KLEIN: And during what quarter, Counsel, are you
18 asking for?

19 MR. RISK: The fourth quarter of 2010.

20 THE COURT: September to December.

21 MR. RISK: September through December 2010.

22 MS. KLEIN: OK, your Honor.

23 THE COURT: You do it. I trust you. Say she was out
24 X number of days in that quarter, not at work.

25 MS. KLEIN: Again, I know it's going to be very

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1 similar to your answer before, but if it doesn't exist, it
2 doesn't exist. But I will represent to the Court that as the
3 owner of the company I don't know her time records are kept
4 that way, but if it does, I will be able to provide you how
5 much time.

6 THE COURT: How many days she was out?

7 MS. KLEIN: Yes.

8 MR. RISK: Your Honor, I think we know it exists
9 because it's a consulting firm that bills hours, it's on the
10 QuickBooks. All I want is production of the QuickBooks.

11 THE COURT: I'm not giving you that.

12 But you review it and tell him how many days she's out
13 in that quarter. I suspect it is available -- I agree with
14 him -- for billing purposes.

15 MS. KLEIN: There wouldn't be anything for billing if
16 she's not there billing.

17 THE COURT: That would show. So Monday through Friday
18 they're billing Monday through Thursday, no billing Friday, I
19 guess she's out. Please do what I can.

20 MS. KLEIN: Of course I will.

21 THE COURT: Thank you.

22 What's next? How many more of these do we have, 17?

23 MR. RISK: One more, your Honor --

24 THE COURT: Good.

25 MR. RISK: -- but this is a letter I wrote two and a

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1 half weeks ago.

2 THE COURT: One more is fine. What is it?

3 MR. RISK: Documents, if any, that describe the
4 payment of time and a half after 40 hours as, quote, an
5 incentive perk. I don't think there are any but if there are,
6 I'd like to see them.

7 THE COURT: I think I might have just read something
8 like that in the in camera stuff.

9 MS. KLEIN: He has that letter, the finalized letter
10 that was delivered to employees.

11 THE COURT: It sounded like incentive pay or
12 something.

13 MR. RISK: It's our point, your Honor, that up until
14 March 31st of 2009 it was always called overtime.

15 THE COURT: So are there any documents that describe
16 it as incentive pay?

17 MS. KLEIN: No. Ms. Romano testified that she didn't
18 believe that there are any other documents.

19 THE COURT: And you have not seen any?

20 MS. KLEIN: No.

21 THE COURT: So she's not withholding anything; it
22 doesn't exist.

23 MR. RISK: I'd like them to look so I can tell your
24 Honor in my papers there are none.

25 THE COURT: Correct. She says she has and there are

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1 none.

2 MR. RISK: That's all I have, your Honor.

3 THE COURT: Now, you have a complaint?

4 MS. KLEIN: Yes, it's a very -- I think the only two
5 outstanding things in regard to plaintiff's responses to
6 defendant's request essentially fall under two categories. And
7 we have been going back and forth although plaintiff's counsel
8 has still not produced documents and we're at an impasse.

9 In particular, the requests dealt with -- the ones
10 that I would like to pursue with the Court -- documents from
11 plaintiff which concerned her interest in employment
12 opportunities, including but not limited to cover letters, job
13 inquiries, applications of employment that she submitted to
14 potential employers before coming to join VisuaLex. The reason
15 I believe this is incredibly important is because it goes to
16 the heart of what the plaintiff was representing to
17 employers --

18 THE COURT: I don't think so at all. You can send out
19 a hundred letters, but it doesn't matter, it's the job you got.
20 What are your duties at the job, are you entitled, are you
21 exempt or nonexempt? It doesn't matter what you wrote in a
22 hundred other letters because those are not jobs you got and it
23 just doesn't matter.

24 MS. KLEIN: Your Honor, I would disagree slightly with
25 one thing because in regards to the professional exemption, it

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1 actually does matter.

2 THE COURT: No, it doesn't. Her duties here either
3 involved legal work or didn't involve legal work. There's a
4 job category, job description. There are other employees who
5 had it; they weren't lawyers. I suspect this lawyer thing is a
6 red herring. I'm not ordering her to do that. You lose that
7 point.

8 Next.

9 MS. KLEIN: I don't have to pursue the other one. It
10 falls under the same vein, where I believe it's relevant but --

11 THE COURT: I don't.

12 MS. KLEIN: I hear you.

13 THE COURT: Right, OK, thank you.

14 MS. KLEIN: Your Honor, also just for the record,
15 since we have the record here, I just want to represent also,
16 the professional exemption, just for clarity -- and the regs
17 are very clear -- you could have five other professionals or
18 exempt people that are hired for the same position and they can
19 be nonexempt and the one person if they're hired because of a
20 particular --

21 THE COURT: Because of?

22 MS. KLEIN: Yes.

23 THE COURT: Well, that's the key point.

24 MS. KLEIN: That's exactly why this woman was --

25 THE COURT: "Because of" is what she represented here,

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1 what she applied for here, what they interviewed her for here.
2 I don't care about the other letters in the job market. You
3 send a hundred letters out. Have you read the article about
4 the law graduate lawsuits that are going on?

5 MS. KLEIN: Yes.

6 THE COURT: Some of these people ended up in Starbucks
7 making coffee. They're lawyers, so they wrote two different
8 kinds of resume all over the place.

9 MS. KLEIN: Yes.

10 THE COURT: All right.

11 MR. RISK: Thank you, your Honor. We'll see you next
12 week.

13 MS. KLEIN: Thank you, your Honor.

14 THE COURT: Don't forget to get the premotion
15 conference letters in the appropriate number of days in
16 advance. So the way the rules say it, the moving letter six
17 days in advance, the response letter three days.

18 MR. RISK: Thank you, your Honor.

19 MS. KLEIN: Thank you, your Honor.

20 * * *